

November 30, 2005

VIA ELECTRONIC FILING (ECFS)

Marlene H. Dortch, Esq., Secretary
Federal Communications Commission
445 Twelfth Street SW
Washington, DC 20554
Attn: Video Division, Media Bureau

Re: TELEVISION STATION SECTION 339(a)(2)(D)(vii) WAIVER REQUEST
MB Docket No. 05-317
KUPN(TV)/KUPN-DT, Sterling, Colorado
Facility ID No. 63158
Dear Ms. Dortch:

Channel 20 TV Company ("Channel 20"), the licensee of analog television station KUPN(TV), Sterling, Colorado and the permittee of digital television station KUPN-DT, Sterling, Colorado ("KUPN"), by its counsel, hereby requests a waiver of digital testing pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004. This waiver request is filed in accordance with the procedures set forth in the Commission's November 17, 2005 *Public Notice*¹ and Section 339 of the Communications Act of 1934, as amended (the "Act").²

KUPN is a satellite station of KTVD(TV), Denver, Colorado, and is a UPN affiliate. The Denver DMA is one of the top 100 markets in the country, and KUPN has received a tentative channel on its allotted digital channel (Channel 23).³ Accordingly, satellite subscribers in the Denver DMA may request digital testing to determine eligibility for receiving distant UPN digital signals beginning on April 30, 2006.⁴ Channel 20 requests that the Commission grant KUPN a waiver to prohibit such testing because KUPN qualifies under one of the criteria enunciated in Section 339 of the Act. Specifically, because KTVD's digital signal has been severely limited due to presently irremediable zoning legal impediments, Channel 20 is unable to deliver a digital signal to KUPN.⁵

As the Commission is well aware, KTVD and other member stations of Lake Cedar Group, LLC ("LCG") have been attempting for over eight years to construct a multi-use tower on Lookout

¹ *TV Station Requests for Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Be Filed by November 30, 2005 or February 15, 2007*, Public Notice, DA 05-2979 (rel. Nov. 17, 2005) ("*Public Notice*").
² 47 U.S.C. § 339.
³ See FCC File No. BFRFECT-20050210ADP (approved June 23, 2005).
⁴ *Public Notice* at 1 (citing 47 U.S.C. § 339(a)(2)(D)(vii)).
⁵ See *Public Notice* at 2 (criterion II); see also 47 U.S.C. § 339(a)(2)(D)(viii).

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Mountain in Jefferson County, Colorado. The Jefferson County Planning Commission, City of Golden, CARE and LCG are involved in ongoing litigation concerning the tower proposal. See the attached "Status Report on Lake Cedar Group Multi User Tower on Lookout Mountain" previously filed with the Commission. A further status report on this litigation will be filed shortly by LCG. In addition, the City of Golden, Colorado recently notified LCG of the city's intent to condemn the LCG property pursuant to the city's alleged eminent domain powers. LCG intends to vigorously pursue its interests in the pending litigation and oppose the city's condemnation attempts with respect to the LCG property. However, until these zoning and other legal impediments are removed, KTVD will be unable to build out its digital facilities as authorized by the Commission. KUPN's ability to transmit a DTV signal due to these clear zoning impediments faced by its parent station, KTVD, is not remediable pending the outcome of the litigation.

For the foregoing reasons, Channel 20 submits that it has provided clear and convincing evidence of KUPN's eligibility for waiver pursuant to Section 339 of the Act and the rules and policies promulgated thereby by the Commission.

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in dark ink, appearing to read "David A. O'Connor", is written over the printed name.

David A. O'Connor

Counsel for Channel 20 TV Company

cc (via courier): Nazifa Sawez, FCC

STATUS REPORT ON LAKE CEDAR GROUP MULTI-USER TOWER ON LOOKOUT MOUNTAIN

The Commission is well aware of the long history of the Lookout Mountain zoning litigation, as set forth in prior requests for extension of time to construct, and will not be repeated here. The present status is as follows:

On September 17, 2003, the City of Golden, CARE and other parties (the "Plaintiffs") filed a Complaint with the District Court, County of Jefferson, Colorado, seeking review of the Jefferson County Board of Commissioners' rezoning determination, along with a claim for preliminary and permanent injunction and declaratory relief (Case No. 03 CV 3045). LCG filed a motion seeking dismissal of the injunction claims and the declaratory judgment claim. On December 12, 2003, the Court dismissed the declaratory judgment claim but allowed the injunction claims to proceed. LCG filed an Answer to the Complaint on December 22, 2003.

On January 16, 2004, Plaintiffs filed a Motion to Stay the Effect of the Zoning Resolution and for Preliminary Injunction seeking to enjoin the Board from issuing development and building permits and seeking to enjoin LCG from continuing development and construction of the new tower. Plaintiff's Motion also sought to stay the effect of the Board's August 19, 2003 grant of rezoning. The LCG Opposition to the Motion was filed on February 2, 2004 and Plaintiff's Reply was filed on February 17. A one-day hearing on the Motion was heard on March 26, 2004 at the conclusion of which District Judge R. Brooke Jackson enter a preliminary stay order enjoining the County from allowing Lake Cedar to begin construction of its proposed multi-user telecommunications tower pending: (1) the County permitting Plaintiffs to respond in a meaningful way to certain so-called "late-filed" documents; and (2) the County receiving and considering competent evidence on the "guy wire failure" issue.

In accordance with the Court's order, after notice as provided by law, the Jefferson County Board of Commissioners held further hearings on August 12 and August 17, 2004, for the taking of evidence and the hearing of argument on the two issues specified by the Court and on August 31, 2004, for the purpose of rendering a decision. On August 31, the Board found that "the applied for rezoning is in its [sic] best interest of the health, safety, morals, convenience, order, prosperity and welfare of the residents of Jefferson County" and unanimously voted to adopt the resolution approving the rezoning of the Lookout Mountain site to accommodate the Lake Cedar tower as proposed in the Site Development Plan.

On September 3, 2004, Lake Cedar filed with the Court a Status Report requesting confirmation that the County's further hearing and decision complied with the Court's order of March 26, 2004 and that the stay order was lifted by its own terms. Jefferson County on September 7, 2004 joined in the Lake Cedar Status Report stating "the Board believes it has fully complied with the Court's 'stay order,' and agrees [with Lake Cedar] that the stay order should be vacated" and sought the Court's "guidance with regard to scheduling further proceedings. . . ." By handwritten order of September 13, 2004, Judge Jackson ruled that "the parties may re-brief the issue and/or set another hearing. The Court will not lift the stay based upon the defendant's request alone (without complying w/ C.R.C.P. 121 § 1015(8) either)."

On September 20, 2004 Lake Cedar filed a Motion to Lift Stay which was joined in by the County and opposed by Plaintiffs. On September 29, 2004, Plaintiffs filed a Motion for Leave to File an Amended Complaint. After the receipt of other pleadings, Judge Jackson, on October 25, 2004, issued an Order stating:

The [Jefferson County] Board has since conducted additional hearings and has reaffirmed its decision to permit Lake Cedar to proceed with construction. Lake Cedar wants the preliminary injunction lifted. Plaintiffs oppose the motion. They note that the Board has not yet certified a record of its additional hearings. They argue that the certified record will demonstrate that the Board has still not received competent evidence concerning the guy wire issue, and that it makes no sense to dissolve the preliminary injunction with a permanent injunction hearing yet to come.

Given plaintiffs' representation as to what the certified record will demonstrate concerning the guy wire issue, the Court at this time denies the motion to lift the stay. I caution plaintiffs, however, to keep in mind the narrow focus of the remand order and the limited jurisdiction of courts in respect to review of administrative action under C.R.C.P. 106(a)(4).

The Court directs the Board to certify the record as soon as possible, and it directs the parties to set a permanent injunction hearing promptly after the record is certified. If it appears that the plaintiffs are not complying with the latter direction, the Court may reconsider this order. To the extent plaintiffs' motion for filing a certification of record is not rendered moot by the foregoing direction to the Board, it is denied. The Court's intent is that the Board certify a record of the proceedings on remand, as a supplement to the record previously certified.

Plaintiffs' motion for leave to amend the complaint is denied.

It is expected that the Board will certify the record of the proceedings on remand by mid-December and that the briefing for the permanent injunction hearing will be concluded approximately 90 days after the record is certified with the hearing before the Court to follow shortly thereafter. If the permanent injunction is lifted, it is expected that Jefferson County will formally approve the Lake Cedar Site Development Plan and issue the necessary building permits. Neither will be issued, however, until the Court's injunction is lifted. Construction will start as soon as is reasonably practical after the required permits are issued (weather permitting).

With regard to the physical facilities, all electrical, mechanical and architectural designs for the building, tower and antenna have been completed. Bids for the building have been received; however, the bids have expired because Lake Cedar could not select a bid because of the delay in receipt of County approvals. Lake Cedar will attempt to time the further bidding on the fabrication, construction and erection to coincide with the issuance of the necessary County authorizations.

It should be noted that Lake Cedar has placed in escrow, for the benefit of the County, \$551,113 to guaranty the removal of the existing towers and buildings and \$831,942 to guaranty completion of the quasi-public improvements required by the Site Development Plan at the site.